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No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1931

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS, TRADING AS ADAMS & KITCHEN, ET AL., PETITIONERS

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

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GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS, trading as Adams & Kitchen, et al., petitioners

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, and Union Stock Yard & Transit Company, respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

INTRODUCTORY STATEMENT

This brief, filed as amicus curiae with the permission of the court, will deal solely with the question of law decided favorably to petitioners by the Commission and adversely to them by the District Court, namely, the right of petitioners, commission merchants doing business in the Union Stockyards

in Chicago, to recover reparation in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers, and also as factors and agents for and on behalf of the livestock shippers who were the consignors.

The District Court held that the petitioners had no such interest in the claims for reparation as entitled them to maintain suit thereon under section 16 (2) of the Interstate Commerce Act, because after selling the live stock consigned to them and collecting the proceeds of the sale, they remitted the net amount realized to the consignors or shippers, deducting all transportation charges, including the extra charge of 25 cents per car for unloading which the Commission found should not have been collected, and that, therefore, petitioners had suffered no damage. On this ground alone, the Court directed a verdict in favor of respondents. (R. 60) *Adams & Kitchen et al.* v. *Mellon,* 39 Fed. (2d) 80.

The Circuit Court of Appeals, not so entirely satisfied of the correctness of the District Court's conclusion upon this question as to justify its "deciding the appeal upon ground so formal and technical, if a proper result may be reached upon the merits of the cause," affirmed the judgment of the lower court on the merits, without definitely deciding the question of the right of petitioners to maintain the suit, although the wording of its

opinion gives the impression it inclined toward the view of the lower court. (R. 389, 51 Fed. (2d) 620.)

The question decided by the District Court is an important one, arises frequently in cases brought before the Commission and it is the Commission's interest in that question which led it to seek permission to file a brief herein, upon the assumption that the Court would deem it appropriate or necessary to decide that question, perhaps as the primary question in the case to be disposed of before considering the merits.[1]

The proceeding before the Commission related to the matter of charges for loading and unloading shipments of livestock at the Chicago union stockyards. This service was performed by the Stock Yard Company and for many years its charges therefor were absorbed by the railroads which transported the livestock to or from Chicago. Their line-haul rates included this service and no extra charge was collected from the shippers. On May 21, 1917, the Stock Yard Company increased its loading and unloading charges by 25 cents per car,

[1] The fact that the Commission has recommended to Congress that its duties in respect of reparation be restricted does not seem to be relevant here. (See 1931 Annual Report, pages 93–94; 1930 Annual Report, pages 90–93, under the heading "Reparation." In the 1930 report there is a discussion of the decision of this Court in the *Darnell-Taenzer case* and of the Commission's decision in the *Missouri-Portland Cement case*, and of the conflicting opinions of the Federal district courts on the question.)

i. e., from 25 and 50 cents to 50 and 75 cents, respectively. The line-haul carriers refused to increase their absorptions, with the result that the extra amount of 25 cents per car was collected from the consignors or consignees.

After full hearing and regular procedure, the Commission found that for more than fifty years carriers delivering live stock at the Chicago yards had loaded and unloaded the cars and made no charge extra therefor; that more than 4,000 cars of livestock are frequently delivered at the stockyards in Chicago on a single day; that if the consignees or shippers undertook to unload their inbound shipments, or to load outbound shipments, there would result such confusion and congestion at the stockyards as seriously to interfere with orderly and prompt performance of the service; that under the regulations of the Stock Yard Company no shipper is permitted to perform the service, even if he should demand the right to do so; that for years the line-haul rates to Chicago, plus a charge of $2.00 per car for terminal or switching service, had constituted the through charge and included delivery of livestock to the consignee at the stockyards; that it is not the duty of the shipper to load and unload livestock in the stockyards at Chicago but that the duty to perform this service is upon the carriers; that the services of loading and unloading livestock are part of the transportation; and that the collection of separate charges for loading or

unloading in addition to the line-haul rates was an unlawful and unreasonable practice.[2] The Commission further found that reparation should be awarded for all such extra loading and unloading charges. (R. 144, 146.)

The practice of collecting a separate charge for loading and unloading in addition to the line-haul

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[2] Unreasonable practices are prohibited by Section 1 (6) of the Interstate Commerce Act, and during the period of Federal control were prohibited and made unlawful by Section 10 of the Federal Control Act. (40 Stat. 451, 456–457.) Section 16 (1) authorizes the Commission to award reparation for any violation of the Act, including unreasonable practices, and Section 206 (c), Transportation Act, 1920 (41 Stat. 456, 461–462), gave the Commission jurisdiction to hear and determine, in the manner provided by the Interstate Commerce Act complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial or otherwise in violation of the Interstate Commerce Act.

The opinion of the Circuit Court of Appeals seemed to lose sight of the fact that it is within the statutory power of the Commission to award reparation for any violation of the Interstate Commerce Act, including violation of section 1 (6) prohibiting unreasonable practices (also, as to the period of Federal Control, section 10 of the Federal control act, prohibiting unreasonable practices). Its opinion, it seems to us, either determines initially an administrative question or substitutes its judgment for the judgment of the Commission upon an administrative question, thus disregarding repeated decisions of this Court holding that it is not within the jurisdiction of the courts to exercise administrative functions either initially or upon review.

rate came to an end on February 28, 1920, the effective date of Transportation Act, 1920, which amended Section 15 of the Interstate Commerce Act by adding paragraph (5) thereto, which specifically prohibits such practice.

Upon the passage of the amended act the line-haul carriers provided for the absorption of the full amounts of the loading and unloading charges and thereafter made no attempt to collect any part of these charges from the public. (R. 143–144.)

For this reason no order by the Commission for the future was necessary, and its reparation order covered shipments which moved during the period from May 21, 1917, the date of the increase of 25 cents per car in the loading and unloading charges, to February 28, 1920, the effective date of Transportation Act, 1920.

The reasonableness of the innumerable line-haul rates to and from Chicago was not in issue and the Commission made no finding in respect thereto. Nor did the Commission find it necessary to pass upon the reasonableness of the separate charges of the Stock Yard Company for loading and unloading, in view of its finding that those services were included in the transportation of livestock and no extra charge could be made therefor. Nor did the Commission find that the apprehensions of the line-haul carriers that the Stock Yard Company might make any charge it pleased, which the line-haul carriers would be required to pay, were well founded for the reason that—

> Upon their complaint or upon the complaint of any party, we can examine any of the charges that make up the sum of the through charges, and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and the divisions thereof or otherwise, as the facts may warrant. (R. 145.)

The Commission's reparation order, dated December 12, 1927 (R. 157–208), awarded reparation to other complainants than petitioners and against other defendants than the respondents herein, but such other awards are not here involved. This suit relates only to the reparation awarded petitioners, all of whom are commission merchants, members of the Chicago Live Stock Exchange, on inbound shipments which moved during Federal control—December 28, 1917, to February 28, 1920.

It is undisputed that the petitioners were the consignees of all the shipments in question and that they paid to the carriers all transportation charges, including the extra unloading charge of 25 cents per car. It is also undisputed that in each and every instance the transportation charges which were paid by the petitioners were later charged back and collected from the consignors.

The Commission held, however, that "this would not affect the right of the complainant consignees [petitioners] to awards of reparation," and in this connection said:

> * * * There is a direct and well-established relation between the complaining

members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stockyards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants. The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled. *Memphis Freight Bureau* v. *St. L. & S. F. R. R. Co.*, 57 I. C. C. 212 (100 I. C. C. 269–270; R. 151.)

The Commission found that the petitioners "made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers. * * *" (100 I. C. C. 270; R. 151–152.)

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, the Federal Control Act, and Transpor-

tation Act, 1920, are set forth in the appendix, following page 36.

ARGUMENT

Petitioners, as parties to the transportation transactions, who paid the charges to the defendant carriers, were entitled to maintain proceedings to recover reparation in their own names and right and as factors and agents for the consignors

The principal objection urged to the right of petitioners to recover the reparation awarded to them by the Commission was that in remitting to the shippers, petitioners deducted all transportation charges and therefore petitioners were not damaged. This contention, it seems, is answered by the decisions in *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, and *Louis. & Nash. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.[3]

In the *Darnell-Taenzer Case*, the Court, speaking through Mr. Justice Holmes, said:

> The only question before use is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in

[3] A report of the Commission in that case, *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R. Co.*, 51 I. C. C. 635, contains an interesting discussion of the circumstances under which the Commission will award or decline to award reparation.

regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds* v. *Mapes-Reeve Construction Co.*, 177 Massachusetts, 41, 44. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios,* with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. *State* v. *Central Vermont Ry. Co.*, 81 Vermont, 459. See *Nicola Stone & Myers Co.* v. *Louisville & Nashville R. R. Co.*, 14 I. C. C. 199, 207–209. *Baker Manufacturing Co.* v. *Chicago & North Western Ry Co.*, 21 I. C. C. 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co.* v. *Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical

mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts.

The cases like *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. See *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 429. *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473. (*Ibid.*, 533–535.)

In the *Sloss-Sheffield case*, a similar objection was made, namely, that the steel company could not recover because it was not damaged by the excessive freight charges. Mr. Justice Brandeis in discussing this contention said—

> The carrier concedes, as it must under *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, that a recovery for excessive freight charges can be had under section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted.

And in concluding the discussion the Justice said:

> The carrier did not know of the provision in the sales contracts. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them. (269 U. S., at p. 238.)

It is to be observed that had the carriers collected from the petitioners less than their applicable tariff rates, or had failed to collect the extra 25-cent unloading charge, the carriers could have sued the petitioners at any time within the three-year period of limitation for the undercharge, *and the petitioners would have been liable.*

The liability of commission merchants for undercharges was settled by *N. Y. Cent. R. R.* v. *York and Whitney Co.*, 256 U. S. 406. In that case "the railroad company as terminal carrier sued York and Whitney Company, a commission merchant, to recover the balance claimed for freight and refrigeration on 9 carloads of melons, vegetables and fruit consigned to the latter, subject to lawful charges, and delivered at Boston during the years 1911 and 1912." (*Ibid.* 407.) "When York and Whitney Company accepted the cars it paid all charges claimed. The merchandise was sold at once and the net proceeds remitted to the shippers. Later, the railroad company discovered that it had collected less than lawful rates established under the Interstate Commerce Act, and thereupon de-

manded the balance alleged to be due by reason of such undercharges. Maintaining it had accepted the shipments upon the understanding that the charges were as reported, and had not agreed to pay more, York and Whitney Company refused the demand." (*Ibid.*, 407.)

"Commission merchants," the court said, "often receive from strangers shipments of perishable articles for sale at market prices. Under a trade custom such things are promptly disposed of and the net proceeds remitted to the consignors. Successful conduct of the business requires prompt settlements. The court below held that whether York and Whitney Company impliedly agreed to pay the rates imposed by law was a question of fact to be determined upon consideration of all the circumstances. It accordingly approved a judgment, entered upon a verdict, favorable to that company as to charges upon one carload * * *, and in behalf of the railroad for those claims on account of eight carloads * * *." (*Ibid.*, 407–408.)

The court held:

> We think the doctrine announced in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink,* 250 U. S. 577 (November 10, 1919), is controlling, and that the liability of York and Whitney Company was a question of law. The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to

> charge. The consignee could not escape the liability imposed by law through any contract with the carrier. (*Ibid.*, 408.)

The party from whom the carrier has collected the transportation charges has the reciprocal right to obtain refund from the carrier for any overcharge. The same theory of law which makes the party paying the freight charges liable for undercharges also vests in him the right to obtain refund of overcharges.

Mr. Justice Holmes, in the *Darnell-Taenzer case,* said, *the plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.* Here the carriers unlawfully collected the money from the petitioners and under the theory of the law they should pay it back to them. In the *Railway Mail Pay case, United States* v. *N. Y. Cent.,* 279 U. S. 73, 79, the Court, again speaking through Mr. Justice Holmes, said:

> If the claim of the railroads is just they should be paid from the moment the application is filed. In the often-quoted words of Chief Justice Shaw, "If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston,* 15 Pick. 198, 208.

So here, if a court could have been called at the exact time and place when the petitioners paid the

sums unlawfully collected from them, the true rule of justice would have been to pay the overcharge back to them instantly.

Under the above authorities it would seem that petitioners were entitled to recover in their own right. But it must be remembered that while the Commission's order directed payment of the reparation to the petitioners, it was not intended either by them or the Commission that they would or should keep the money. The Commission's finding, as made in its report (100 I. C. C. 270; R. 151–152), was that petitioners were "entitled to reparation, as factors and agents for the shippers."

The facts set out in the Commission's report indicate a continuing relationship of agency as between the petitioners and their customers, not a mere temporary agency which ends with the remitting of the proceeds from the sale of a particular consignment. As stated in the report, "the commission merchant at the stockyards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit." And the report points out that the carriers "have frequently recognized this relationship by settling loss and damage claims with the commission merchants." (R. 151.)

These commission merchants are members of the Chicago Live Stock Exchange, which maintains an organization familiar with railroad tariffs and practices and experienced in the filing and prosecuting of claims.

The case at bar involved thousands of shipments from widely scattered points of origin. The suit on the reparation order related to 560,005 carload shipments (R. 11), made by 174,000 different shippers. (R. 117.) Unless presented by an organization acting as agent for the shippers, it seems obvious that, as a practical matter, such a claim could not be prosecuted at all. But the interstate commerce law is not so inflexible as to preclude the prosecution of a claim of this character by and through an agency.

The principle under which reparation was awarded to petitioners was not essentially different from that under which reparation was awarded to the complainant in *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492.

In that proceeding the question before the Commission was whether reparation which the Commission found was due, on 71 carloads of sand, could properly be awarded to the cement company. That company was the vendor and consignor of the shipments, and, as complainant in the Commission proceeding, claimed the reparation. The sales contract specified that the terms of the sale were "f. o. b. complainant's plant," which of course put the obligation to pay the freight charges on the pur-

chasers, who were the consignees. The complainant actually prepaid the transportation charges to the railroad but admitted that by separate invoices it subsequently collected from the consignees the amounts so paid.

The consignees had not filed claim for reparation with the Commission within the two-year period of limitation provided by the Act and therefore their claim was barred. But the cement company had filed claim within the two-year period. The cement company contended that "it paid and, as between it and defendant, bore the charges on these shipments; that it is a proper party to bring this proceeding; that defendant is not entitled to retain the amounts by which the charges exceeded those found by us [the Commission] to have been reasonable; and that, *since the statute of limitations has run against the consignees, refusal now to award reparation to complainant would deprive the consignees of any right or opportunity to effect a recovery.*" (88 I. C. C. 492, 493.) The defendant in reply cited numerous cases in which the Commission had held that the party who actually bore the charges *as such* is the only one entitled to recover.

Conceding that the defendant's statement of its prior practice was accurate, the Commisison said:

> The decision of the Supreme Court in *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, however, has led us to reexamine this question and consider whether or not

we are, as a matter of law, required to confine awards of reparation to parties who actually bore the charges as such. In order to avoid misunderstanding, it should be stated that the facts in that case were not parallel with those by which we are here confronted, and the issue, although similar, was not the same. It is the reasoning which the court employed in reaching its conclusion which is of significance and importance in the present proceeding. (*Ibid.*, 493.)

After reviewing the facts in the *Darnell-Taenzer case,* setting out the pertinent provisions of the Interstate Commerce Act (sections 8 and 16 (1)), and quoting the conclusions of this Court in that case, the Commission (speaking through Mr. Commissioner Eastman) said:

> As aforesaid, this *Darnell-Taenzer case* is not on all fours with the one now before us. There the consignors were the plaintiffs, but the consignees paid the freight charges in the first instance and deducted them from the invoice price for the lumber. Here, also, the consignor is the complainant, but it paid the freight charges in the first instance and subsequently collected them, by separate invoices, from the consignees. But the Supreme Court has said that the "general tendency of the law, in regard to damages at least, *is not to go beyond the first step,*" that "plaintiffs suffered losses to the amount of the verdict *when they paid,*" and that "their claim *accrued at once* in the theory of the law and *it does not inquire into later events.*"

Recognizing that these remarks were directed to an issue which was not identical with the one here presented, although similar, it becomes necessary to consider the essential reasoning of these conclusions and its application to the facts of this case.

Two things are clear. One is that the fact that complainant suffered no ultimate damage is not of controlling importance. In the *Darnell-Taenzer case* plaintiffs transferred the damage to the consumer through the selling price of the lumber. Here complainant transferred it to the consignees through separate invoices, and doubtless it finally reached the consumer. As the Supreme Court states in the *Darnell-Taenzer case*: "Probably in the end the public pays the damages in most cases of compensated torts." The court has made proximate rather than ultimate damage the test, and has said that proximately the losses accrue when the charges are paid. The question, then, is whether in this case complainant "paid" the charges within the meaning of the court. This leads directly to the second point which is clear, and that is that the consignees from whom complainant collected the charges by separate invoices paid the charges and could have maintained an action for recovery, for in the *Darnell-Taenzer case* the charges were paid by the plaintiffs in a similar manner. That is to say, payment was not direct to the railroad but through a third party. Conceding that here the consignees

bore and "paid" the freight charges as such, did the complainant also pay within the meaning of the court?

It appears that, to be entitled to recover, a party must have "privity with the carrier." Undoubtedly there was here privity of contract between complainant and defendant. It was complainant, as consignor, that contracted with defendant for the carriage of the sand, and defendant could have held complainant responsible if the charges had not been paid. * * *

But, as we have indicated above, there may also be privity between the carrier and the consignee, if the latter actually bears the freight charges as such. Consideration of how such privity arises will, we think, throw light upon the question at issue. Where the consignor contracts with the railroad for the movement of the goods but sells the goods f. o. b. point of origin and collects the freight charges from the consignee, it is clear that the consignor is acting as an agent and that the consignee is the undisclosed principal in the transaction. Cases might be cited, but it will hardly be questioned that this is the nature of their relationship. Moreover the right of an agent to sue in his own name, when the principal is undisclosed and makes no objection, is recognized. Quoting from Ruling Case Law, Vol. 21, page 902:

"The right of an agent to sue on a contract which he has entered into in his own name without disclosing his agency, if the

> principal makes no objection, seems to have met with universal recognition. Accordingly, a person who, having in charge, as agent, the goods of another, makes with a common carrier a contract to ship such goods, in which the agency is not disclosed, may maintain action in his own name for a breach of such contract."
>
> In this case not only did the consignees, the undisclosed principals, make no objection to the action brought by complainant, their agent, but the records shows that one of them at least was represented at the hearing and wholly aware of the nature of the proceeding. The conclusion follows that under the circumstances of the case complainant had a right to bring the action. The consignees also had such a right and, if they had exercised it, they would have been substituted for complainant, but they did not exercise it.

The Commission held that reparation might be awarded to complainant, but observed, that doubtless the consignees "will have the right to recover from complainant any reparation that he may be awarded with respect to the 71 carloads, the freight charges upon which they bore as such." (*Ibid.*, 496.)

The Commission added:

> It is not necessary for us to go beyond the "first step," and under the circumstances of this case the first step was taken by complainant when it paid the freight charges.

The Commission's report indicates that it realized the cement company was maintaining the proceeding virtually as the agent of the consignees and that the reparation would ultimately go to the consignees.

If the cement company had failed to pay the reparation over to the consignees, the latter would have had the right to sue the cement company. This principle was recognized in *Jennison Bros. & Co.* v. *Chicago & N. W. Ry. Co. et al.*, 158 N. W. 398. In that case the carrier had refunded an overcharge to the consignee. Thereafter, the consignor, who bore the freight charges as such, sued the consignee and in turn recovered the amount of the overcharge.

In the case at bar, the Commission awarded the reparation to complainants "as factors and agents for the shippers." It is intended that the reparation shall go to the shippers, who actually bore all the transportation charges, and if the petitioners fail to pay over the money, they will be liable to suit. Not only in *Memphis Freight Bureau.* v. *St. L. S. F. R. R. Co.*, 57 I. C. C. 212, but also in other cases, including *Texas Livestock Shippers League* v. *Director General*, 139 I. C. C. 448, the Commission has awarded reparation to factors or agents.

The Commission has awarded such reparation on the ground that the complaints were not only factors or agents of the shippers but were also either

consignors or consignees of the shipments and paid the excessive charges to the carriers, and that it is of no concern to the carriers whether the excess was passed on to a third party pursuant to a contract. As the thought was expressed by the Commission in *American Smelting & R. Co.* v. *Director General*, 144 I. C. C. 570, 572.

> It is of no concern to defendant whether the excess was passed on to a third party pursuant to a contract of sale. The claim arose in contemplation of law the moment the overcharge was paid and the party who paid it was entitled to recovery from that moment.

Under this rule a carrier may safely refund an overcharge to the party from whom he collected it, without being compelled to determine rights and equities as between that party and third parties and without fear of being compelled to pay the same overcharge twice because of mistake of paying it in the first instance to the wrong party.

The District Court seemed to find a contribution to its differentiation of the *Darnell-Taenzer case* in the suggestion that the commission merchants did not pay the freight charges out of their own money but in doing so used the money of the shippers. There appears to be nothing to show that the particular money which the commission men paid over to the Stock Yards Company, in payment of the transportation charges (line-haul rate, switching charge of $2.00 per car, and unloading charge of 25

cents per car) was earmarked as the shipper's money, but it seems that the fact is immaterial. The matter having substance would seem to be that the commission men were *legally liable* for the charge, as so conclusively settled in *N. Y. Cent.* v. *York & Whitney Co.*, 256 U. S. 406, previously cited.* If they had not paid it then, they would have been liable for it later, even though they had remitted all proceeds from the sale of the livestock. In the *York & Whitney case,* the commission men were held liable for the undercharges, despite the fact that the merchandise had been sold at once and the proceeds, less the freight and other charges, had been remitted to the shippers.

The District Court seemed also to be influenced by the decision in *Parsons* v. *Chgo. & N. W. Ry. Co.*, 167 U. S. 447, for it quoted from that decision as follows:

> The only right of recovery given by the I. C. C. Act to the individual is to the "person or persons injured thereby, for the full amount of damages sustained in consequence of any of the violations of the provisions of this act." So, before any party can recover under the act he must show, not merely the wrong of the carrier, but that the wrong has in fact operated to his injury. (R. 72–73.)

But that holding seems to do no more than state what the Act itself provides in sections 8 and 16

* See also *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577; *L. & N. R. R.* v. *Central Iron Co.*, 265 U. S. 59.

and does not seem to suggest a solution of the question here presented, viz, whether the petitioners did suffer damage within the meaning of those sections; and it is to be observed that in the later decision in the *Darnell-Taenzer case* the court held that—

> The plaintiffs suffered losses to the amount of the verdict when they paid. (245 U. S., 1. c. 534.)

And in that case, as here, the plaintiffs "were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge * * *."

The fact, noted in the opinion of the District Court (R. 66) that the petitioners did not "sue as assignees as was done in the case of *Spiller* v. *A., T. & S. F. Ry. Co.*, 253 U. S. 117," is of no significance. In that case the plaintiff Spiller (Secretary of Cattle Raisers' Association) was neither consignor nor consignee of the shipments involved, was not a party to and had no interest whatever in the transportation transactions, and did not pay the unreasonable freight charges or any part of them. Under these circumstances, obviously he could sue for recovery of the reparation only under assignments of the claims. He was in a position fundamentally different from the petitioners here, who were parties to the transportation transactions, who were consignees of the shipments, who paid the charges later found by the Commission to have been unlawfully collected, who were liable

for any undercharges, and who were also factors and agents of the shippers.

The interpretation by the District Court of this Court's decision in the *Darnell-Taenzer case* as simply holding that the court, in a suit on a reparation award, "will not inquire into the commercial effect of the payment of an illegal freight rate" (R. 71), fails to give effect to significant facts in the *Darnell-Taenzer case.*[5] That case arose out of a proceeding before the Commission reported as *Burgess* v. *Transcontinental Freight Bureau,* 13 I. C. C. 668. (June 2, 1908.) There the Commission found that the rate charged on hardwood lumber from points of production in Tennessee and Wisconsin to the Pacific Coast, as advanced in 1904, had been unreasonable and awarded reparation. Complainants, including the Darnell-Taenzer Lumber Co., were the consignors of the lumber and had sold f. o. b. destination. (See 221 Fed. 890, 894.) The freight charges were not prepaid by the complainants but were paid by the consignees upon delivery of the shipments to them at destination. In settling with complainants, the consignees deducted the amount of the freight charges from the complainants' invoices. Therefore, the complainants and not the consignees "bore" the freight charges *as such,* but it is obvious that had the invoice price been fixed high enough to include the

[5] For a full history of that case see 13 I. C. C. 668; 19 I. C. C. 659; 190 Fed. 659 (D. C.); 221 Fed. 890 and 229 Fed. 1022 (6th C. C. A.); 245 U. S. 531.

amount of the freight charges, the consignees would have actually borne the freight charges, not as freight charges but as part of the price of the lumber. It appears that the advance in the freight rate had been included in the amount of the invoice price. Defendants contended that although complainants had paid and borne the freight charges "as such," they had not been injured, inasmuch as they had passed those charges on to the consumer in the price for their lumber. The Commission overruled this contention and awarded reparation, which award was ultimately sustained by this Court. In its report the Commission said:

> This case shows that hardwood lumber has moved to the Pacific coast in larger quantities since the rate was advanced in 1904 than it did previously. The use of hardwood upon the Pacific coast has very much increased. Importations from foreign countries have been greater and shipments from the east have also grown. The amount of lumber sent west from these points of origin is insignificant in comparison with the total amount handled, and the price is but little influenced by the market upon the Pacific coast. The dealer in Wisconsin or at Memphis has charged substantially the same price whether his sales were in the East or for export or for shipment to California, *and this means, of course, that the advance in the freight rate has been added to the price paid by the consumer.* (Italics not in original.) (13 I. C. C. 668, 679.)

Now, it does not appear clearly whether the consignees were the consumers of the lumber or whether they were brokers, jobbers, or dealers, but it does seem clear that the Darnell-Taenzer Co., in selling the lumber to the consignees, fixed a price that included the advance in the freight rate, so that the consignees, whether they were the consumers or not, actually paid the freight charges at least to the extent they were unreasonable. If reparation could not be awarded to the consignors on this account, then the question would arise whether the consignees were entitled to it, and of course it might be urged that the consignees were wholesale or retail dealers and that they were not injured because they, too, had passed the transportation charges along.[6] Addressing itself to this situation the commission said:

> It is impossible to say to what extent these complainants may have been actually damaged by the advance in this rate, *if the word damage is to be interpreted and applied as claimed by the defendants.* (Italics ours.)
>
> Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a rea-

[6] If, in the case at bar, the consignors of the live stock to the Chicago stockyards had themselves presented claims for reparation, a similar contention would have been just as logical—that the price obtained by the Chicago commission merchants and remitted to the consignors included the extra 25-cent unloading charge and therefore the consignors were not injured.

> sonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. (*Ibid.*, 680.)

This quotation discloses the essential holding of the Commission and indicates where the Commission will stop in the chain of events leading to the actual bearer of the burden. The Commission added:

> If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported. (13 I. C. C. 680.)

Referring to this language Justice Holmes said:

> Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result.

> 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts. (245 U. S. 534.)

Thus the essential holding of the Commission and the Court is not merely that the court "will not inquire into the commercial effect of the payment of an illegal freight rate," as suggested by the court below, but that the Commission and the Court need not "go beyond the first step." That "first step" is the payment of the illegal charges; it is then that the party suffers damage, and when his claim accrues in the theory of the law which does not inquire into later events. Subsequent transactions between that party and third parties are, to the carrier, *res inter alios,* with which the carrier is not concerned.

It is stated in the opinion of the District Court:

> If this case were decided in accordance with the earlier holdings of the Commission, it is clear that plaintiffs cannot maintain this suit. If, on the other hand, it is to be decided in accordance with the holding of the Commission in the *Missouri Portland Cement Company case,* and forty or fifty similar holdings since the decision in that case, then the plaintiffs are the proper parties to maintain this suit. (R. 69.)

The present rule of the Commission is disclosed not only by the *Missouri Portland case* but also by two more recent cases, the first of which is *Doughty-McDonald Grocery Co.* v. *A., T. & S. F. Ry. Co.,* 155

I. C. C. 47. There the complainants were the consignees of shipments of salt which they had purchased f. o. b. destination. They paid the freight charges to the delivering carrier but deducted similar amounts from the invoices when remitting to the sellers. The Commission said:

> It appears that to be entitled to recover, a party must have "privity with the carrier." Undoubtedly there was here privity of contract between complainants and defendants. When a carrier delivers freight to a consignee and the consignee accepts delivery and pays transportation charges, thereby extinguishing the carrier's lien, a contract on the part of the consignee to pay undercharges, if any exist, is implied. Consequently, the carrier may recover in a suit for such undercharges against the consignee. *Union Pac. R. Co.* v. *American Smelting & Refining Co.*, 202 Fed. 720; 121 C. C. A. 182. For the same reasons that a consignee can be compelled to pay an undercharge, he should have the reciprocal right to recover any amount that he has been compelled to pay in excess of a just and reasonable charge. In either case, he may have paid the freight in the dual capacity of consignee and agent. The principal, namely the one who bore the charges as such, may have been the consignor or even a stranger to the transportation records. The facts are not disclosed to the carrier when the consignee pays the freight, and the carrier is not in a position,

nor is it required, to ascertain whether the consignee is making the payment for himself or on behalf of another. Consequently, the fact of the agency and the name of the principal may be undisclosed. In the case last cited, the carrier was permitted to recover undercharges from the consignee as such, irrespective of any agreement concerning the charges as such which may have been entered into between the consignee and consignor. Thus, for example, an agent for an undisclosed principal may be personally liable in certain circumstances. Conversely, such an agent should, and does, have the reciprocal right, under certain circumstances, to sue in his own name. Quoting from Ruling Case Law, Vol. 21, page 902:

"The right of an agent to sue on a contract which he has entered into in his own name without disclosing his agency, if the principal makes no objection, seems to have met with universal recognition."

As between the consignee and the carrier, in a suit where the consignor makes no objection to the complaint brought by the consignee, the first step is that taken by the former when, as consignee, it pays the freight charges to the carrier. Where, as here, no objection is made by the consignor, we need not go beyond this first step. *Southern Cotton Oil Co.* v. *Director General,* 89 I. C. C. 154, overruling in principle *Baker Mfg. Co.* v. *C. & N. W. Ry. Co.,* 21 I. C. C. 605. (Ibid., 49–50.)

A similar situation arose in *California Fruit Exchange* v. *American Railway Express Co. et al.*, 155 I. C. C. 105. The question was whether the complainant was entitled to reparation on 22 shipments on which the complainant paid the freight charges to the delivering carrier and later passed them on to the consignors for whose account complainant had handled the shipments. The defendants questioned the complainant's right to reparation on these 22 shipments, contending that as the Interstate Commerce Act provides for reparation only to persons who are damaged, no reparation could be awarded complainant on these shipments upon which it did not bear the freight charges. The defendants admitted "that under the holding in *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, the carrier is liable if complainant has proximately suffered loss, but contend that the mere payment of excessive charges makes only a prima facie case of damage in that there arises a presumption of damage from such payment, and that this presumption may be overcome by definite proof negativing the fact or amount of damage." The fact that complainant had passed the charges on, defendants contended, negatived the fact of damage. In respect of these contentions the Commission said:

> In the case cited, which was a suit brought to recover reparation from the railroads for a rate alleged to be excessive, the court held that where a shipper has paid a rate after-

wards found unreasonable, he may recover as damages the difference without specific proof of pecuniary loss; and that proximately the losses accrued when the charges are paid. Contentions similar to those advanced by defendants here were advanced in *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492, upon which case complainant here relies, and which was decided by us subsequent to the case above cited. Therein we found that in determining who is entitled to reparation it is not necessary to go beyond the first step; that the first step is taken when the freight charges are paid; and that the fact that whoever paid in the first instance suffered no ultimate damage is not of controlling importance. In the absence here of the consignors who finally bore the charges, the inquiry need not extend further than to determine who paid the charges in the first instance. Under the circumstances of this case, the first step was taken by complainant when it paid the freight charges through its agent, the auction company. Defendants also refer to *L. & N. R. R.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, but the findings herein are not in conflict therewith. (*Ibid.,* 107.)

In the *Sloss-Sheffield case* the consignor and consignee were both parties to the case and both claimed the reparation, in which circumstances it was necessary to determine which of the contesting parties bore the freight charges as such. As be-

tween the consignor and consignee, the one who bore the charges as such prevails. See *Dolese Bros. Co.* v. *A., T. & S. F.*, 89 I. C. C. 110, 122, *Joyce-Watkins Co.* v. *Walsh Tie Co (Mo.)*, 236 S. W. 1105, and *Jennison Bros. & Co.* v. *Chicago & N. W. Ry. Co.*, 158 N. W. See also Note 2 in *Doughty-McDonald Grocery Co.* v. *A., T. & S. F. Ry. Co.*, 155 I. C. C. 47, 50.

Thus the rule followed by the Commission at the present time is this: As between the consignee and the carrier, in a suit where the consignor makes no objection to the complaint brought by the consignee, the first step is that taken by the former when, as consignee, he pays the freight charges to the carrier. Where no objection is made by the consignor, the Commission need not go beyond this first step. Where there is objection by the consignor and he makes a counter claim, as in the *Sloss-Sheffield case*, the one who bore the charges as such prevails.

CONCLUSION

It is submitted that the present rule of the Commission is sound as a matter of law, being fully supported by the decisions of this Court in the *Darnell-Taenzer, Sloss-Sheffield,* and *York & Whitney cases.* Under this rule the Commission awarded reparation to the petitioners in the case at bar. It follows that the petitioners did have the right to maintain an action under section 16 (2) to recover on the Commission's award.

Respectfully submitted.

J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission, of Counsel.

MARCH, 1932.

APPENDIX

The Interstate Commerce Act, U. S. Code, Title 49, provides:

> SEC. 1 (6). It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.
>
> SEC. 8. That in case any common carrier subject to the provisions of this Act shall do,

cause to be done, or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 15 (5). Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

SEC. 16 (1). That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled

to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

SEC. 16 (2). If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

The Federal Control Act, c. 25, 40 Stat. 451, 456–457, provides:

SEC. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at com-

mon law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. * * *

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being

operated under a unified and coordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

Transportation Act, 1920, c. 91, 41 Stat. 456, 462, provides:

SEC. 206 (c). Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year, or, if so claimed

in respect of overcharges above the legal tariff charge, within two years and six months, after the termination of Federal control, against the agent designated by the President, under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under the Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

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